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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1063

CHARLES WRIGHT, JIMMY CARTER, RUFUS HOOKS
ESTELLE JOHNSON and FRANCIS SPIRES,

Petitioners,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioners Charles Wright, Rufus Hooks, Jimmy Carter, Estelle Johnson and Francis Spires, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of Illinois.

JUDGMENT AND OPINION OF THE COURTS BELOW

The judgment of the Circuit Court of Cook County, Criminal Division was entered on May 12, 1966, is not reported, but appears in the record filed with and certified by the Clerk of the Supreme Court of Illinois, and transmitted herewith.

The opinion of the Supreme Court of Illinois affirming said judgment was entered on November 22, 1968, is reported at —— Ill. 2d. ....., 242 NE. 2d. 180, and is set forth in the Appendix attached hereto.

JURISDICTION

The opinion and judgment of the Supreme Court of Illinois was rendered on November 22, 1968.

This Court's jurisdiction is conferred by Title 28, Section 1257 (3), U.S.C.

QUESTIONS PRESENTED

1.

WHETHER, ASSUMING PROBABLE CAUSE, POLICE OFFICERS MAY FORCE ENTRY INTO A HOME IN THE NIGHTTIME WITHOUT A WARRANT IN ORDER TO MAKE AN ARREST FOR A MISDEMEANOR OF A NONVIOLENT NATURE.

2.

WHETHER THE POLICE WHO ACT PURSUANT TO AN INVALID SEARCH WARRANT MAY DELAY EXECUTION OF THE WARRANT AND SET UP A SURVEILLANCE IN ORDER TO ESTABLISH INDEPENDENT PROBABLE CAUSE FOR AN ARREST AND INCIDENTAL SEIZURE.

STATUTES INVOLVED

THE STATUTORY PROVISION INVOLVED IS THE ILLINOIS REVISED STATUTES, 1965, Chapter 38, Paragraph 121-3.

STATEMENT OF CASE

About 10:00 p.m. on the night of November 24, 1965, five police officers went to an address armed with a search warrant for the second floor. [This warrant was held to be invalid and is not in issue here]. However, the officers did not proceed forthwith to execute the command of the search warrant, but instead set up a surveillance of the premises.

The officer who testified on the Motion of Suppress stated that he observed numberous persons known to him as "policy runners"* enter the first floor of the premises. He then proceeded to the rear of the premises where he stood under the elevated train tracks within three feet of the rear window. At this vantage point, he heard a woman say: "Are all your books in? Who has any short books? Where is all the money?" Then he heard an adding machine. These expressions indicated to him that a gambling operation was going on, he said.

The police then knocked on the door, were refused admission, forced entry, arrested the defendants, and seized items later introduced, over objection, at petitioner's trial for gambling.

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*We do not further discuss the allegation that petitioners were "known" to the officers as "policy runners". Such an allegation is but "a bold and unilluminating assertion of suspicion that is entitled to no weight in appraising [probable cause]." *Spinelli* v. *United States*, —— U.S. .... decided January 27, 1969, #8.

REASON FOR GRANTING THE WRIT

1.

THE OPINION IN THE CASE AT BAR IS IN CONFLICT WITH NUMEROUS CASES DECIDED BY THIS COURT WHICH HOLD THAT THE POLICE MAY NOT FORCE ENTRY INTO A HOME WITHOUT A WARRANT, ABSENT EXIGENT CIRCUMSTANCES.

In the case at bar, the police forced entry into petitioner's home at 10:00 p.m. without a warrant, in order to make an arrest for gambling. The probable cause relied upon was that one of the officers stood within three feet of petitioner's window and had heard an adding machine and someone say: "Are all your books in? Who has any short books? Where is all the money?"

In *Jones* v. *United States,* 357 U.S. 493, this Court chose to by-pass the following issue:

> ". . . whether the forceful nighttime entry into a dwelling to arrest a person reasonably believed within, upon probable cause that he had commited a felony, under circumstances where no reason appears why an arrest warrant could not have been sought is consistent with the Fourth Amendment." [357 U.S. at 499-500].

We respectfully submit that this is the case, and this is the time for this Court to answer this important question.

The instant cause is directly in conflict with *McDonald* v. *United States,* 35 U.S. 451, where the officers looked through a transom, saw persons engaged in gambling and arrested them.

In language directly applicable to the case at bar, the Court said:

> "This is not a case where the officers, passing by on the street, hear a shot and a cry for help and demand entry in the name of the law.
>
> "Where, as here, officers are not responding to an emergency there must be compelling reasons to justify the absence of a search warrant [335 U.S. at 454].

This above principle, and the *McDonald* case, were cited approvingly just last term in *Katz* v. *United States,* 389 U.S. 347, footnote #19.**

It is no answer to say that in *McDonald* the officers invaded the privacy of the landlady in order to observe the activity through the transom, whereas here, the officers stood on public property, because the Court assumed in *McDonald* the government's "syllogism": that the officers were lawfully within the hallway, " as much so as if Mrs. Terry [The landlady] had admitted them" [355 U.S. at 454].

In *Johnson* v. *United States* 333 U.S. 10, this Court refused to allow the police to enter a home without a warrant though they smelled burning opium emanating from the room.

This Court specifically followed *Johnson* v. *United States,* 333 U.S. 10, in *Chapman* v. *United States,* 365

**Despite this Court's reliance upon no less than nine cases [*Katz* v. *United States,* 389 U.S. at 357, footnotes #18 and 19] for the proposition that "searches conducted . . . without prior approval by judge or magistrate are *per se* unreasonable under the Fourth Amendment, "— none of which involved 'electronic eavesdropping'—the Illinois Supreme Court still says ". . . we believe *Katz* is applicable only to those instances where electronic eavesdropping devices or other articifical means are employed in addition to the natural senses" 242 NE 2d 180, 183.

U.S. 610, even though the entry there was effectuated with the consent of the landlord.

Here, as in *McDonald* v. *United States,* 335 U.S. 351, *Johnson* v. *United States,* 333 U.S. 10, and *Chapman* v. *United States,* 365 U.S. 610:

> "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to bypass the Constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction . . . [*Johnson* v. *United States,* 333 U.S. 10, 15, quoted in *Chapman* v. *United States,* 365 U.S. 610, 615.]

The Illinois Supreme Court's reliance on *Harris* v. *United States,* 390 U. S. 234 [240 N. E. 2d at 183] is completely misplaced. *Harris* involved a seizure of an item in plain view from a car over which the police had lawful control, whereas the instant case involved a nighttime forceable entry into a home without a warrant.

2.

THE ACTION OF THE POLICE IN DELAYING THE EXECUTION OF THE SEARCH WARRANT, WHEN IT BECAME EVIDENT THAT THE WARRANT WAS INVALID, IN ORDER TO SET UP A SURVEILLANCE OF THE PREMISES VITIATED THE SUBSEQUENT ARREST AND SEIZURE.

The police after obtaining a search warrant for the second floor of a certain address went to the premises. When they arrived, instead of executing the warrant they set up a surveillance, saw numerous persons enter the building, and then observed activity on the first floor. Without first attempting to obain a valid warrant they forced entry to the first floor.

Just last term this Court held that:

> "A search conducted in reliance upon a warrant cannot later be justified on the basis of consent if it turns out that the warrant was invalid." [*Bumper* v. *North Carolina,* 88 S. Ct. 1788, 1792].

Is it now the law that when the police go to private premises pursuant to a search warrant which in invalid, they may delay execution of the warrant, and peer into the windows of the premises in the night in order to obtain evidence upon which to justify an arrest so as to overcome the deficiences of the invalid warrant?

As in *Accarino* v. *United States,* 179 F. 2d 456, D.C. Cir., 1949, the police ". . . had ample time and opportunity to make the arrest(s) on the street." [179 F. 2d at 464] but they did not do so.

As in *McKnight* v. *United States,* 183 F. 2d 977, D.C. Cir., 1950, the officers delayed execution of the process

[here a search warrant, in *McKnight* an arrest] until they could use the arrest as a pretext for a search.

Interestingly, though advanced in Petitioner's brief before the Illinois Supreme Court, that Court simply did not face the issue of whether the police may delay the execution of a search warrant in order to make a surveillance of the premises in the hope of obtaining probable cause to make an arrest without a warrant.

CONCLUSION

We pray this Honorable Court grant its Writ of Certiorari.

Respectfully submitted,

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APPENDIX

Docket No. 40639—Agenda 13—September, 1968.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, *vs.*

CHARLES WRIGHT *et al.*, Appellants.

Mr. JUSTICE UNDERWOOD delivered the opinion of the court:

On May 12, 1966, the defendants were found guilty of gambling after a bench trial in the Cook County circuit court. The sentences imposed ranged from 3 months imprisonment and a $300 fine to one year's probation and a $100 fine. Defendants contend the evidence introduced against them in the trial court was illegally seized by police officers who, without consent or a valid search warrant, entered a private dwelling for the purpose of making an arrest.

The sole witness at defendant's trial was arresting officer Herman Waller, a Chicago policeman with 4 years experience, who testified he had made approximately 300 previous "policy" (a numbers game) arrests. On November 24, 1965, Waller secured a search warrant for the second floor apartment of a two-story frame building at 1702 North Bissell in Chicago. He and four other officers arrived outside the premises at about 9:30 P.M. and established a surveillance of the building because they were informed that the individuals involved in a policy operation there would not be in the second floor apartment until 10:00 or 10:30 P.M. During the surveillance Officer Waller observed persons who were allegedly engaged in the policy operation entering the first floor apartment rather than the second floor apartment. The officer testified that he recognized some of these people as "known policy runners"

whom he had arrested many times before, and after some 35 minutes spent in watching the front of the apartment building he proceeded to the rear of the premises to look into a window of the first floor apartment which was partially covered by curtains. Since the building did not have a back yard the officer was able to stand 1 to 3 feet from the rear window under the elevated tracks on the Chicago Transit Authority right-of-way. Through a crack in the window curtain Officer Waller testified that he could see the heads of the people inside, and through the closed window he could hear an adding machine being operated and a female voice inquiring: "Are all your books in? Who has any short books? Where is all the money?" From his extensive experience with policy gambling operations the officer knew that adding machines were commonly used to add up the sums of money collected, and he also knew that a "short book" referred to a situation where a runner does not have enough money to "clear" his bets on a particular book. After about ten minutes of watching and listening through this window, Officer Waller went to the front door of the apartment, knocked, announced his office, and forced his way in after the person coming to the door told him to "get lost." The officer then went directly to the kitchen in the rear of the apartment where he observed defendants Estelle Johnson, Francis Spires and a third defendant who is not a party to this appeal sitting at a table with an adding machine, policy writings and policy result slips thereon. Another defendant, Charles Wright, yelled "Police" and threw a bag containing $179.35 behind a washing machine. Defendants Rufus Hooks and Jimmy Carter were also in the kitchen and a search of them revealed they were carrying policy writing and money in their pockets. At this time Officer Waller testified defendants Wright, Carter and Hooks made var-

ious incriminating remarks to him. Defendant Wright asked him, "Well, why don't you go out and leave this policy alone." Defendant Clark stated, "Okay, you got me, let's go", and defendant Hooks remarked, "Well, you have finally got me."

The single question presented by the facts of this case is whether the trial court was correct in refusing to suppress the evidence thus secured, and resolution of this question depends upon whether the defendant's fourth amendment rights against unreasonable searches and seizures were violated. It is of no consequence that the search warrant obtained by police was quashed because it authorized a search only of the second floor apartment of the two-story building, since defects in a search warrant are immaterial if the search can be otherwise justified. (*People* v. *Washington,* Docket No. 40660; *People* v. *Williams,* 36 Ill. 2d 505, 509; *People* v. *Brinn,* 32 Ill. 2d 232, 241.) The test of the constitutionality of a search "is not whether it was reasonable or practicable for the officers to obtain a search warrant, but whether the search was unreasonable. It is well established that a search without a warrant is reasonable and valid if it is incident to a lawful arrest and there is no requirement that the arrest be under the authority of an arrest warant. (*Ker* v. *California,* 374 U.S. 23, 41, 83 S. Ct. 1623, 10 L. ed. 2d 726.) In turn, the validity of an arrest without a warrant depends upon whether the officers had reasonable cause to believe that an offense had been committed and that the defendant had committed it. (*People* v. *Jones,* 16 Ill. 2d 569, 573.). The test is not whether there is sufficient evidence to convict the arrested person, but probable cause exists for arrest where a reasonable and prudent man, having the knowledge possessed by the officer at the time of the arrest, would believe the defendant com-

mitted the offense. (*People* v. *Hightower,* 20 Ill. 2d 361, 366.) In deciding the question in a particular case, courts deal with probabilities and are not disposed to be unduly technical. (*People* v. *Fiorito,* 19 Ill. 2d 246, 256.)" *People* v. *Jones,* 31 Ill. 2d 240, 243-4.

In *Davis* v. *United States* (9th cir.), 327 F.2d 301, 305, the rule is stated that " 'It is well established that it is not a search to observe what is open and patent either in daylight or in artificial light. United States v. Lee, 274 U.S. 559, 47 S. Ct. 746, 71 L. Ed. 1202; Boyd v. United States, 4 Cir., 286 F. 930; Smith v. United States, 4 Cir., 2 F. 2d 715; Safarik v. United States, 8 Cir., 62 F. 2d 892, 895 * * *.' Petteway v. United States, 261 F. 2d 53, 54 (4th Cir. 1958). As was said by Judge Holtzoff in United States v. McDaniel, 154 F. Supp. 1, 2 (D.C. 1957), affirmed 255 F. 2d 896 (D.C. Cir., 1958) and cert. denied, 358 U.S. 853, 79 S. Ct. 82, 3 L. Ed. 2d 87 (1958), Williams v. United States, 363 U.S. 849, 80 S. Ct. 626, 4 L. Ed. 2d 1732 (1960), 'if, without a search and without an unlawful entry into the premises, a contraband article * * * is seen in the premises, the police are not required to close their eyes and need not walk out and leave the article where they saw it.' " (See *People v. Tate,* 38 Ill. 2d 184, 187; *State* v. *Carpenter,* 181 Neb. 639, 150 N.W. 2d 129, 134-5.) This plain view doctrine has been applied to anything which an officer becomes aware of by use of his five senses while in a lawful position. *Walker* v. *State* (Okl. Cr.), 270 P. 2d 1107; seee also *United States* v. *Shue* (4th cir.), 385 F. 2d 416.

As recently as *Harris* v. *United States,* 390 U.S. 234, 19 L. Ed. 2d 1067, 88 S. Ct. 992, 993, the United States Supreme Court reaffirmed the principle that "objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and

may be introduced in evidence. Ker v. State of California, 374 U.S. 23, 42-43, 83 S. Ct. 1623, 1634, 1635, 10 L. Ed. 2d 726 (1963); United States v. Lee, 274 U.S. 559, 47 S. Ct. 746, 71 L. Ed. 1202 (1927); Hester v. United States, 265 U.S. 57, 44 S. Ct. 445, 68 L. Ed. 898 (1924)." However, in *Katz* v. *United States,* 389 U.S. 347, 19 L. Ed. 2d 576, 88 S. Ct. 507, a pre-*Harris* decision, the Supreme Court held that use of an electronic eavesdropping device to overhear one side of a telephone conversation in a public telephone booth was an unconstitutional search and seizure regardless of the fact that the device employed did not happen to penetrate the wall of the booth. The court there noted that the underpinnings of the "trespass" doctrine had been so eroded that it could no longer be regarded as controlling. We do not, however, read *Katz* as indicating any constitutional infirmity in the instant search, for we believe the seemingly restrictive ruling in *Katz* is applicable only to those instances where electronic eavesdropping devices or other artificial means are employed in addition to the natural senses. We read the reaffirmation of the lawful position aspect of the plain-view doctrine in *Harris* as retaining the viability of the trespass doctrine in those cases where law enforcement officers gain information concerning crimes by use of their natural senses. Therefore, while the absence of a trespass is no longer to be an adequate ground to justify the admission of evidence secured through use of the natural senses assisted by artifical means, the lack of a trespass is still a highly relevant consideration in sustaining the admission of evidence which has fallen into the plain view of an officer, *i.e.,* gathered solely by the use of his natural senses.

We have here a law enforcement officer using his senses of vision and hearing to discover what is occurring inside a private residence. In three Federal cases (*Brock* v.

United States (5th cir.), 223 F. 2d 681; *California* v. *Hurst* (9th cir.), 325 F. 2d 891; *Texas* v. *Gonzales* (5th cir.), 388 F. 2d 145) it was held that evidence procured by officers standing on the *defendants premises* and peering into their windows constituted a search in violation of the defendants' fourth amendment "right to be let alone." This case differs from those on the physical facts because here the police officer watched and listened through the rear window of the first floor apartment while standing on public property, a C.T.A. right-of-way where he had a right to be, rather than trespassing on defendants' property; and the absence of a trespass under our reading of *Harris* is of major if not decisive importance in cases involving the plain-view doctrine. We need not make the resolution of this appeal turn on the absence of a trespass by Officer Waller, however, because the *Brock-Hurst-Gonzales* cases do not hold that officers can never acquire probable cause to arrest by looking in windows of private residences, "but only that they must have probable cause to think that a crime is being committed before they do so." (388 F. 2d at 148.) It is clear that when Officer Waller peered through the rear window in question, he had ample cause to believe that a policy operation was being conducted on the premises. The officer knew that by issuing a search warrant for the second floor apartment of the two-story structure at 1702 North Bissell a court had found there was sufficient cause to believe that a policy operation was being carried on in the building. Furthermore, he had been informed that those individuals involved in the gambling activity would not arrive at the apartment until 10:00 or 10:30 P.M., and when he observed persons known to him as policy runners whom he had arrested on many prior occasions enter the first floor apartment at about 10 o'clock that evening we

hold that he had probable cause to believe that the policy operation was being conducted in that apartment on that particular night. (See *Davis* v. *State,* 166 Tex. Cr. 480, 316 S. W. 2d 745.) Therefore the evidence which was seized incident to the arrest of the defendants was properly admitted.

The judgment of the Cook County circuit court is accordingly affirmed.

Judgment Affirmed.

Mr. JUSTICE WARD took no part in the consideration or decision of this case.